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No. 82-1022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALABAMA FURNITURE CO.,
Petitioner,

vs.

C. KENNETH STILL, TRUSTEE, and ULYSSES RIVERS, JR.,
Respondents.

On Petition For A Writ Of Certiorari
To The Sixth Circuit Court of Appeals

MEMORANDUM OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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1 Collier on Bankruptcy (14th ed.) ¶ 1.10 9

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For purposes of this Memorandum, Respondent accepts the material in the Petition for a Writ of Certiorari included under the headings, "Jurisdiction" and "Opinion Below".

STATEMENT

The Respondent, C. Kenneth Still, Trustee, accepts the STATEMENT of Petitioner only to the extent that this "case", as opposed to the Petition, "presents an issue of exceptional public importance and urgency." (Pet. 1). However, that Respondent agrees with the importance and urgency of a determination being made whether or not this country's bankruptcy system effectively functions after release of the mandate in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, ___ U.S. ___, 102 S. Ct. 2858 (1982), on December 24, 1982, does

not place Respondent in agreement with Petitioner that the questions presented for review and positions advanced in the Petition properly represent the real issues the Court must consider in this case. The issues framed by Petitioner, supposedly motivated by its desire to prevent "[e]conomic chaos" and "[l]egal confusion", (Pet. 2), effectively would place this Court in the position of repealing the work of Congress that culminated in the enactment of the Bankruptcy Reform Act of 1978 and supplanting that statute with the Bankruptcy Act of 1898 (repealed by the 1978 Act) in direct contradiction with everything intended by the Congress by its enactment of the Bankruptcy Reform Act of 1978. The suggestion to "scrap" the 1978 Act seems more the product of Petitioner's own post-*Northern Pipeline* confusion than it is a contribution to effective bankruptcy administration.

Respondent takes strong exception with the representation made by Petitioner that the Bankruptcy Reform Act of 1978 "made a few substantive changes." (Pet. 2). Numerous substantive changes of enormous importance to the bankruptcy system have been incorporated into the 1978 Act. Furthermore, those changes are in addition to and totally and completely independent of the nature, structure and composition of the court of bankruptcy. A few examples illustrate this point.

The Bankruptcy Reform Act of 1978 represents the first comprehensive and unified statement by Congress on all aspects of the subject of bankruptcy. Prior thereto, the subject of bankruptcy emerged over a period of time through a hodgepodge of statutory law, case law and rules of procedure. *See, e.g.*, 11 U.S.C. §§1 *et seq.* (repealed by Pub. L. No. 95-598, §401[a]); and 28 U.S.C. §2075 (Which, prior to its amendment by Pub. L. No. 95-598, §247, provided that all laws in conflict with the rules promulgated under that section were of no force or effect). Yet, this pre-1978 hodgepodge is offered by Petitioner as an acceptable alternative. Petitioner also implies

that, had Congress been told that the 1978 Act was invalid in whole or in part, it would have replaced that Act with the 1898 Act rather than elect any other legislative course of action.[1]

Provision for a United States trustee is an excellent example of a new substantive development incorporated into the 1978 Act. 11 U.S.C. §§1501 *et seq.* The pilot program for U.S. trustees "adds a role for a government official to supervise bankruptcy administration, and to fill the vacuum of lack of creditor participation, where necessary to assure fair and efficient administration." H. Rep. at 100.

The elimination of the different types of business reorganizations and their consolidation into one, simplified chapter is a significant change from pre-1978 bankruptcy law. 11 U.S.C. §1101 *et seq.* and H. Rep. at 220-261.

Individual debtor relief under Chapter XIII of the 1898 Act was available only to "an individual whose principal income is derived from wages, salary or commissions." 11 U.S.C. §1006(8) (repealed effective 1979). Under chapter 13 of the 1978 Act, any individual "whose income is sufficiently stable and

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[1] The 1978 Act had the broader and more general purpose of restating the whole area of bankruptcy law, not just the court system.

> The major purpose of this bill is the modernization of the bankruptcy laws. The substantive law of bankruptcy and the current bankruptcy system was designed in 1898, in the horse and buggy era of consumer and commercial credit, and was last overhauled in 1938, nearly 40 years ago. It has only been since 1938 that the consumer credit industry has grown; and it has only been since the widespread adoption of the Uniform Commercial Code in the early 1960's that commercial credit has grown to its present magnitude. As the issue of bankruptcy has fallen from the national consciousness since the Great Depression in the 1930's, the bankruptcy system has fallen into disrepair.

H. R. Rep. No. 95-595, 95th Cong., 1st Sess. 3-4 (1977) (footnotes omitted) (hereinafter cited as "H. Rep.")

regular to enable such individual to make payments under a plan" may obtain relief thereunder. 11 U.S.C. §101(24). Under chapter 13 there is the additional broader protection of an automatic codebtor stay. 11 U.S.C. §1301.

Special provision also is made in the 1978 Act for the liquidation of commodity brokers; this did not exist under the 1898 Act. 11 U.S.C. §761-66.

A change of general application is the giving to creditors of a statutory right to adequate protection of their interests in property which otherwise might be affected by the commencement of a case and the specification of methods for obtaining such adequate protection. 11 U.S.C. §§361 and 363. A comprehensive and unified system of federal exemptions was also created. 11 U.S.C. §522(d).[2]

This Court must look with skepticism at any argument based upon the contention that the Bankruptcy Reform Act of 1978 made few substantive changes in bankruptcy law. (Pet. 2, 8.)

This Court is being asked to certify the record of and to review this matter because of certain "Questions Presented" by Petitioner. Those questions have nothing to do with the matter *sub judice* but reflect Petitioner's desire to capitalize on Congress' failure to respond to this Court's pronouncement in *Northern Pipeline Construction Company* v. *Marathon Pipe Line Company*, ____ U.S. ____, 102 S.Ct. 2858 (1982), "that the broad grant of jurisdiction to the bankruptcy courts contained in §241(a) [of the Bankruptcy Reform Act of 1978] is un-

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[2] Worthy of notation are the switch in concept and effect from "secured creditors" to "secured claims", 11 U.S.C. §506(a), the expanded and clarified definition of property of the estate, 11 U.S.C. §541, the avoiding powers given to individuals by 11 U.S.C. §522(f) (the subject of the Court's decision in the *United States* v. *Security Industrial Bank*, ____ U.S. ____, ____ S.Ct. ____ [1982]), and the waiver of sovereign immunity in 11 U.S.C. §106.

constitutional . . . [and that] Congress [by this Court's stay of its mandate herein, was given] an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws". 102 S. Ct. at 2880. For this reason, and the further reasons hereinafter set forth, Respondent respectfully urges this Court to reject the relief requested by Petitioner but to grant the relief requested herein by Respondent.

PROCEEDINGS BELOW

Petitioner has prevailed in the bankruptcy court by having the debtor's voluntary petition for relief dismissed. As a consequence, the value of the security interest held by Petitioner remains exactly as provided by contract. After such dismissal, there is no automatic stay and Petitioner is free to pursue any and all remedies it has against the debtor.

After the dismissal of Respondent's petition, Petitioner moved the bankruptcy court to rescind its order of dismissal and rule that Respondent's petition should be dealt with pursuant to the provisions of the Bankruptcy Act of 1898. The bankruptcy court denied Petitioner's motion which Petitioner then appealed, seeking "relief" in the appellate courts.

ANALYSIS

Petitioner asks this Court to issue its writ in the instant matter "[b]ecause the 1978 Bankruptcy Act is an integrated enactment and cannot be administered apart from its unconstitutional court provisions, [and that] the 1978 Act as a whole falls and the prior Bankruptcy Act revives to govern bankruptcies until further action by Congress." (Pet. 7). The issue that petitioner raises is that this Court ruled or the effect of this Court's ruling in *Northern Pipeline* was that because of Congress' failure to act there does not exist a court capable of applying the *corpus juris* of bankruptcy. Petitioner's argument is utterly erroneous.

This position ignores both the substance and structure of Public Law No. 95-598 as well as the relationship between that law and other federal statutes.

Public Law No. 95-598 admittedly is a comprehensive, "integrated" legislative effort intended to modernize and codify the national law of bankruptcy; but this legislation accomplishes its intended purpose through four separate titles each of which deals with the subject matter therein independent of the subject matter and treatment in the remaining titles. The provisions of title I of the Public Law are the *corpus juris* of bankruptcy; title II contains amendments to title 28 of the United States Code; title III contains amendments made to other federal statutes to conform them to the amendments made in titles I and II; and title IV contains provisions governing the effectiveness of the provisions in the other titles during the period November 6, 1978 - March 31, 1984, and the applicability of other federal law. The provisions of the four titles may be a part of a single effort to deal with a subject matter that appears to be generally singular, but this is not synonymous with interdependence and inseverability as petitioner imports. *Pari materia* is intended to facilitate statutory construction, not to be determinative of constitutionality.

In order for petitioner's thesis to obtain, one of the following must have been abrogated by this Court's judgment in *Northern Pipeline:* (1) a component of the government of the United States with the capability of exercising the judicial function; (2) the capability of any such component to hear and to adjudicate the subject matter of bankruptcy; or, (3) the *corpus juris* of bankruptcy. There is nothing in that decision that suggests that there does not exist a component of the government of the United States capable of applying the *corpus juris.* All that this Court dealt with in that case was the capability of a particular judicial officer to hear and to decide a particular type of matter.

Since the entry by this Court of its judgment in *Northern Pipeline,* there have been many opinions and observations made as to the intent, meaning and breadth of the judgment. The differences between those positions have to do with exactly what limitations exist upon the capability of sitting bankruptcy judges to hear and adjudicate bankruptcy matters. But that is not of consequence in the matter *sub judice.* Such disagreement has nothing to do with whether or not there exists a component of the government of the United States which has the capability of applying a *corpus juris* of bankruptcy.

The Bankruptcy Reform Act of 1978 did create a component of the government of the United States to hear and adjudicate bankruptcy matters. *See* 28 U.S.C. §151 *et seq.* (as enacted by Pub. L. No. 95-598, §201). However, that tribunal was and is not to come into existence until April 1, 1984. Pub. L. No. 95-598, §402(b). Until that time, *viz.*, the time between the effective date of the Bankruptcy Reform Act and April 1, 1984 (the "transition period", Pub. L. No. 95-958, §404[b]), the component of the government of the United States that was in existence at the beginning of that transition period was to be continued.[3] There is nothing in this Court's judgment in *Northern Pipeline* that suggests that the existence of the "continued" court has been compromised or jeopardized. Moreover, the existence of that court does not depend upon the Bankruptcy Reform Act of 1978, or anything in it.

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[3] The courts of bankruptcy, as defined under section 1(10) of the [former] Bankruptcy Act, and existing on September 30, 1979, shall continue through March 31, 1984, to be the courts of bankruptcy for the purposes of this Act and the amendments made by this Act. Each of the courts of bankruptcy so continued shall constitute a separate department of the district court that is such court of bankruptcy under the [former] Bankruptcy Act.

Pub. L. No. 95-598, §404(a).

That such "continued" court has the capability to hear and adjudicate bankruptcy matters also is not dependent upon the Bankruptcy Reform Act of 1978. The "continued" court has that capability because of other federal law which either invests that court with bankruptcy jurisdiction or recognizes such a capability independent both from the Bankruptcy Reform Act of 1978 and anything in it and from the limitations of this Court's judgment in *Northern Pipeline*.

The "court of bankruptcy" referred to in Pub. L. No. 95-598, §404(a) is the United States District Court, brought into existence by 28 U.S.C. §132. The district court is the "court of bankruptcy" not because of anything in the (former) Bankruptcy Act or Pub. L. No. 95-598, §404(a), but because another federal statute invests the district court with the capability to hear and adjudicate bankruptcy matters, 28 U.S.C. §1334.[4] This also must be so since all of the provisions of Pub. L. No. 95-598 that otherwise might accomplish such an investiture do not become effective until April 1, 1984. *See*, Pub. L. No. 95-598, §§402(b) and (c). During the transition period, 28 U.S.C. §1334 remains operative and must be read in connection with the provisions of Pub. L. No. 95-598 that do apply during that period, *viz.*, Pub. L. No. 95-598, §404 *et seq.*

The label "court of bankruptcy" identifies the district court by one facet of its subject-matter jurisdiction. It is no more significant than the identification of the district court as the "court of admiralty". It is not that the "court of bankruptcy", as contemplated and referred to in §404(a) is *eo ipso* "created" thereby; it is that the district court can be identified through the use of a label referring to one of the subject matters within that court's jurisdiction.

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[4] "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy."

That phrase "court of bankruptcy" is a label of historical curiosity, not of judicial significance. As Collier describes it:

> The expression "courts of bankruptcy" occurred first in the Bankruptcy Act of 1867. Its framers obviously borrowed the notion from England, where the bankruptcy law at that time was administered by a separate and distinct judicial organization under the name "Court of Bankruptcy". Accordingly, the view was advanced that American law used the term in the same sense and that, *despite the Act's failure to create a new organization,* "the District Court, when acting as a court of bankruptcy, is none the less a separate and distinct court, and exercising powers and jurisdiction separate and distinct from its powers and jurisdiction as District Court, than it were such separate and distinct organization."

1 Collier on Bankruptcy (14th ed.) ¶ 1.10, pp. 73-74 (footnotes omitted) (emphasis added).

Respondent has demonstrated that the Bankruptcy Reform Act of 1978, other provisions of federal law contained in title 28 and this Court's judgment in *Northern Pipeline* do not abrogate the existence of a court with bankruptcy jurisdiction. Next, Respondent will describe the character of the district court's bankruptcy jurisdiction.

The subject matter of bankruptcy jurisdiction, *i.e.*, its character, can be described in terms of the sources of law which serve as the bases for causes of action, in terms of the relationship between different types of causes of action *inter sese*, in terms of who may be a party to a cause of action, in terms of relief sought, etc. In other words, the character of bankruptcy jurisdiction can be described in as many ways as can any other facet of juridical activity. In the Bankruptcy Reform Act of 1978, Congress chose to describe bankruptcy jurisdiction as encompassing the following: (1) "cases under title 11", (2) "civil proceedings arising under title 11", (3) "civil proceedings arising in cases under title 11", and (4) "civil proceedings related to cases under title 11". This is the taxonomy of 28 U.S.C. §1471.

The same compass of subject-matter jurisdiction also can be described in terms that would include "federal question", "diversity", "ancillary" and "pendent" jurisdiction.[5] In other words, what Congress did when it expressed bankruptcy jurisdiction in the terms it chose and included in 28 U.S.C. §1471 was to state that jurisdiction in terms of and with reference to the *corpus juris* of bankruptcy, *i.e.*, title 11 of the United States Code. But the Bankruptcy Reform Act did not, except to the extent that a matter could arise only because of the existence of title 11, create that which is the character of bankruptcy jurisdiction. That character already existed and had been identifiable because of other sources of law.

That Congress intended bankruptcy courts as constituted pursuant to the provisions of the Bankruptcy Reform Act to administer the provisions of the Act is, as Petitioner asserts, correct. But, as Respondent has demonstrated, that proposition does not lead to the conclusions that if such courts cannot administer the law as so intended (because of this Court's judgment in *Northern Pipeline*), the law in its entirety must fall or that another court does not have the capability to so act. Petitioner disregards the context of bankruptcy within the federal juridical and jurisprudential constellation and fails to understand the character of bankruptcy jurisdiction.

In the second question presented by Petitioner for review, this Court is being asked to rule that the former Bankruptcy Act of 1898, as amended, has been revived by implication from this Court's judgment in *Northern Pipeline* and that that revived 1898 Act must govern the proceedings in this and all other bankruptcy cases. In its use of the term "revived", Petitioner acknowledges that the 1898 Act was repealed by Pub. L. No. 95-598, §401(a).

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[5] See, for example, *Edelman* v. *Jordan*, 415 U.S. 651, 94 S. Ct. 1347 (1974); *United Mine Workers* v. *Gibbs*, 383 U.S. 715 86 S. Ct. (1966); *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 46 S. Ct. 367 (1926); *Dewey* v. *West Fairmont Gas Coal Co.*, 123 U.S. 329, 8 S. Ct. 148 (1887). See, also, 28 U.S.C. §§1331 and 1332.

To revive the 1898 Act would require that the Act of Congress which repealed it, *i.e.*, Pub. L. No. 95-598, §401(a), has itself been vitiated. Congress has not so acted and in the absence of such Congressional action the only other way in which that repealer could have been vitiated is by a judicial determination that the repealer is unconstitutional. *Frost* v. *Corporation Commission*, 278 U.S. 515 (1929). Petitioner suggests this to have occurred as a result of this Court's decision in *Northern Pipeline*.

It seems almost too elementary to observe that nothing stated by this Court in *Northern Pipeline* in any way dealt with, limited or questioned the constitutional power of Congress to repeal the 1898 Act or that this Court vitiated Pub. L. No. 95-598, §401(a). Consequently, Petitioner's position must be based upon its divining such an implicated result from the import of the judgment in *Northern Pipeline*. Such an implication not only is inconsistent with the nature of this Court's treatment of the issues presented to it in *Northern Pipeline* but it is at odds with this Court's purposeful avoidance of any rendering of the provisions *ipso facto* of the Bankruptcy Reform Act (except, of course, for its application of the doctrine of separation of powers).

Respondent will not presume to tell this Court what the intent and meaning of its mandate was in *Northern Pipeline*. It is more than sufficient to quote the following from the plurality opinion:

> Having concluded that the broad grant of jurisdiction to the bankruptcy courts contained in §241(a) is unconstitutional, we must now determine whether our holding should be applied retroactive to the effective date of the Act.

102 S.Ct. 2880.

CONCLUSION

Notwithstanding the dismissal of Respondent's petition by the bankruptcy court below, Petitioner now seeks to bring this matter before this Court for purposes having nothing to do with that dismissal. Respondent urges this Court to dispose of the Petition by making it clear that the relief Petitioner seeks is inappropriate and not in consonance with this Court's judgment in *Northern Pipeline*. More specifically, Respondent suggests that this Court opine that title 11 of the United States Code, as enacted by Pub. L. No. 95-598, in the *corpus juris* of bankruptcy and that the United States district courts have the jurisdiction to hear and to adjudicate all bankruptcy and bankruptcy-related matters pursuant to 28 U.S.C. §§1471(a) and (b), as enacted by Pub. L. No. 95-598, or 28 U.S.C. §1334 and the doctrines of pendent and ancillary jurisdiction.

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